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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

IN RE DYNAMIC RANDOM ACCESS
MEMORY (DRAM) ANTITRUST
LITIGATION

Master File No. M-02-1486PJH
MDL No. 1486

This Document Relates To:

All Direct Purchaser Actions

**NOTICE OF MOTION AND MOTION
FOR PRELIMINARY APPROVAL OF
CLASS ACTION SETTLEMENTS
WITH DEFENDANTS MOSEL
VITELIC CORP., MOSEL VITELIC,
INC. AND NANYA TECHNOLOGY
CORPORATION USA AND
APPROVAL OF NOTICE TO THE
CLASS; MEMORANDUM OF LAW
IN SUPPORT THEREOF**

Time: 9:00 a.m.
Date: May 16, 2007
Judge: Hon. Phyllis J. Hamilton
Courtroom: 3, 17th Floor

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NOTICE OF MOTION AND MOTION

TO THE PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on May 16, 2007, at 9:00 a.m. or at a prior time subject to the Court's calendar, before the Honorable Phyllis J. Hamilton, United States District Court, Northern District of California, 450 Golden Gate Avenue, San Francisco, California, plaintiffs will and hereby do move the Court, pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, for an Order: (i) granting preliminary approval of each of the settlement agreements plaintiffs have executed with (a) defendant Mosel Vitelic Corp. and defendant Mosel Vitelic, Inc. and (b) Nanya Technology Corporation USA (ii) approving the manner and forms of giving notice of the settlement agreements to class members; and (iii) establishing a timetable for publishing the class notice, lodging objections to the terms of the settlement agreements, if any, and the plan of allocation, and holding a hearing regarding final approval of the settlement agreements.

This motion is based upon this Notice of Motion and Motion, the following Memorandum of Law, the Declaration of Guido Saveri In Support of Motion for Preliminary Approval of Class Action Settlements with the Mosel and Nanya Defendants ("Saveri Declaration") and the Proposed Order Approving Joint Notice to Class Regarding Preliminary Approval of Class Action Settlements with the Mosel and Nanya Defendants, the complete files and records in this action, and such other written or oral arguments that may be presented to the Court.

The settlement agreement with defendant Mosel Vitelic Corp. is attached to the Saveri Declaration as Exhibit A. The settlement agreement with the Mosel Vitelic, Inc. is attached to the Saveri Declaration as Exhibit B. The settlement agreement with Nanya Technology Corporation USA is attached to the Saveri Declaration as Exhibit C.

MEMORANDUM OF LAW

I. INTRODUCTION

Plaintiffs have entered into separate settlement agreements ("Settlement(s)") with (a) defendant Mosel Vitelic Corp. ("MVC") and defendant Mosel Vitelic, Inc. ("MVI") (collectively "Mosel") and (b) defendant Nanya Technology Corporation USA ("NTC USA") (collectively the

1 “Settling Defendants”). In return for a release of class members’ claims, MVC has agreed to pay
 2 \$12,000,000 in cash in two payments as described below, and MVI has agreed to pay \$3,000,000
 3 in cash. In total the Mosel defendants have agreed to pay \$15,000,000 in cash.

4 Plaintiffs have also entered into a separate settlement agreement with defendant Nanya
 5 Technology Cooperation USA (“NTC USA”). In return for a release of class members’ claims,
 6 NTC USA has agreed to pay \$7,000,000 in cash. The payment is required to be paid into escrow
 7 within ten (10) business days from the date the motion for preliminary approval is filed.

8 The settlements relate to Settling Defendants’ sales of DRAM¹ to class members which
 9 remain in the case. All settlements provide that Settling Defendants’ sales remain in the case for
 10 purposes of computing the treble damages claim against non-settling defendants, and Settling
 11 Defendants have agreed to cooperate with plaintiffs in their prosecution of the case against the
 12 remaining defendants. (MVC Settlement ¶ 22; MVI Settlement ¶ 23; NTC USA Settlement ¶ 23.)
 13 The Settlements were achieved only after extensive arms-length negotiations and mediations
 14 before Judge Daniel J. Weinstein, Ret. on March 3, 2007 for Mosel and on March 14, 2007 for
 15 NTC USA.

16 Through this motion, plaintiffs seek preliminary approval of each of the Settlements. The
 17 Court is not being asked to determine whether the Settlements are fair, reasonable and adequate at
 18 this time. Instead, the question is simply whether the Settlements are sufficiently within the range
 19 of possible approval to justify sending and publishing notice of the Settlements to class members
 20 and scheduling final approval proceedings. *Armstrong v. Bd. of School Dir. ’s*, 616 F. 2d 305, 314
 21 (7th Cir. 1980) (overruled on different grounds in *Felzen v. Andreas*, 134 F.3d 873, 875 (7th Cir.
 22 1998)); Manual for Complex Litigation (4th ed.) § 13.14 (“First, the judge reviews the proposal
 23 preliminarily to determine whether it is sufficient to warrant public notice and a hearing. If so, the
 24 final decision on approval is made after the hearing.”).

25
 26 ¹ “DRAM” means dynamic random access memory components, including without limitation,
 27 synchronous dynamic random access memory (“SDRAM”), Rambus dynamic random access
 28 memory (“RDRAM”), asynchronous dynamic random access memory (“ASync”), FPM DRAM,
 EDO DRAM, BEDO DRAM, and double data rate semiconductor devices and modules (“DDR”).

1 If preliminary approval is granted, the proposed settlement class members will be notified
 2 of the terms of the Settlements and informed of their rights in connection therewith, including their
 3 right to appear and be heard at the final approval hearing. Plaintiffs will submit a proposed
 4 schedule relating to class notice and the dates of the final hearing prior to the hearing.

5 Accordingly, plaintiffs seek an order: (i) granting preliminary approval of each Settlement;
 6 (ii) approving the manner and forms of giving notice to the settlement class (the "Class"); and (iii)
 7 establishing a timetable for consummation of the Settlements.

8 **II. FACTUAL AND PROCEDURAL BACKGROUND AND DISCOVERY** 9 **CONDUCTED**

10 Defendants are domestic and foreign entities that manufactured, marketed, and/or sold
 11 DRAM in the United States during the class period.² (Compl. ¶¶ 17-34.) Four defendants –
 12 Infineon Technologies AG, Samsung Electronics Company, Ltd., Elpida Memory Inc. and Hynix
 13 Semiconductor, Inc., along with several of their officers, have pled guilty to participating in a
 14 price-fixing conspiracy in the DRAM market in violation of criminal antitrust laws. In addition,
 15 another defendant – Micron – has announced its cooperation with the Department of Justice
 16 ("DOJ") investigation.

17 Plaintiffs and members of the Class are direct purchasers of DRAM from defendants and/or
 18 their subsidiaries, parents or affiliates. (Compl. ¶¶ 6-16.) Plaintiffs seek, among other things,
 19 injunctive relief and treble damages pursuant to Sections 4 and 16 of the Clayton Act, 15 U.S.C.
 20 §§ 15 and 26. (Compl., Prayer for Relief, ¶¶ C, D.)

21 The Court is aware of the factual and procedural background, the discovery conducted by
 22 plaintiffs and the present status of this litigation which has been set forth in detail in the prior

23 ² Defendants are Micron Technology, Inc. and Micron Semiconductor Products, Inc., through its
 24 Crucial Technology division. (collectively "Micron"); Infineon Technologies AG and its wholly
 25 owned subsidiary Infineon Technologies North America Corp.; Hynix Semiconductor, Inc. and its
 26 wholly owned subsidiary Hynix Semiconductor America, Inc.; Samsung Electronics Co., Ltd. and
 27 its wholly owned subsidiary Samsung Semiconductor, Inc.; Mosel-Vitellic Corporation and its
 28 wholly owned subsidiary Mosel-Vitellic Corporation (USA); Nanya Technology Corporation and
 its wholly owned subsidiary Nanya Technology Corporation USA; Winbond Electronics
 Corporation and its wholly owned subsidiary Winbond Electronics Corporation America; Elpida
 Memory, Inc. and its wholly owned subsidiary Elpida Memory(USA) Inc.; and NEC Electronics
 America, Inc. (Comp. ¶¶ 17-34.)

1 motions for preliminary and final approval of the settlements with defendants Infineon, Samsung,
2 Hynix, Elpida, NEC, Micron and Winbond. The Court is respectfully referred to those motions.

3 **III. THE SETTLEMENTS**

4 Class counsel began settlement negotiations with Mosel as early as August of 2006.
5 (Saveri Decl. ¶6.) The action was finally settled on March 3, 2007 in mediation before Judge
6 Daniel J. Weinstein, Ret. (Saveri Decl. ¶6.). Class Counsel began settlement negotiations with
7 NTC USA on July 31, 2007. The action was finally settled on March 19, 2007 after a mediation
8 before Judge Daniel J. Weinstein, Ret. (Saveri Decl. ¶8.).

9 Despite the Settlements, Settling Defendants maintain that they have meritorious defenses
10 to plaintiffs' claims.

11 **A. The Mosel Settlements.**

12 In exchange for dismissal with prejudice and a release of all claims asserted in the
13 Complaint, as noted above, Mosel has agreed to pay \$15,000,000 in cash. This settlement amount
14 is to be divided between MVC and MVI. MVC has agreed to pay \$12,000,000 in cash and MVI
15 has agreed to pay \$3,000,000 in cash. The \$12,000,000 is to be paid in two \$6,000,000 payments,
16 the first within fifteen (15) business days from the date of filing the motion for preliminary
17 approval, and the second on or before April 30, 2007. The \$3,000,000 payment is to be made
18 within fifteen (15) business days from the date of filing of the motion for preliminary approval.
19 (MVC Settlement ¶16; MVI Settlement ¶16). Mosel agrees to provide Plaintiffs' co-lead counsel
20 with a list of class members with whom it has settled and a list of class members with whom it has
21 not settled, and the total amount of purchases made by each class member. Both lists are subject to
22 audit (MVI Settlement ¶ 16; MVC Settlement ¶16.)

23 The Mosel classes consists of:

24 All individuals and entities who, at any time during the period from April 1, 1999 and
25 continuing through June 30, 2002 (the "Class Period"), purchased DRAM in the United
26 States directly from the defendants, their parents, subsidiaries, or affiliates. Excluded from
the Class are defendants and their parents, subsidiaries, affiliates, all governmental entities,
and alleged co-conspirators.

27 (MVC Settlement ¶ 1; MVI Settlement ¶ 1.) Upon the Settlement becoming final, plaintiffs and
28

Class members will relinquish any claims they have against Mosel based, in whole or in part, on matters alleged or that might have been alleged in this litigation. (MVC Settlement ¶¶13-15. MVI Settlement ¶¶13-15) The release, however, excludes claims for product liability or breach of contract, indirect purchaser claims, or claims based on purchases of DRAM outside the United States. (MVC Settlement ¶29; MVI Settlements ¶29.) The Settlements become final upon: (i) the Court's approval of the Settlement pursuant to Rule 23(e) and the entry of a final judgment of dismissal with prejudice as to Mosel; and (ii) the expiration of the time for appeal or, if an appeal is taken, the affirmance of the judgment with no further possibility of appeal. (MVC Settlement ¶11; MVI Settlements ¶11.)

The Settlements also require Mosel to assist Plaintiffs in the prosecution of this case against the remaining defendants by producing documents and making its employees available for depositions and trial, including supplying witnesses necessary to testify as to the authenticity and admissibility of documents. (MVC Settlement ¶22. MVI Settlements ¶23.)

Finally, the Settlements also authorize an additional payment of up to \$250,000 for notice and administrative costs (MVC Settlement ¶16(a)).

Subject to the approval and direction of the Court, the Settlement payments, plus accrued interest thereon, will be used to: (i) make a distribution to Class members in accordance with a proposed plan of allocation to be approved by the Court at final approval based on the dollar value of each Class members' DRAM purchases proportionate to the total claims filed; (ii) pay Class Counsel's attorneys' fees, costs, and expenses as may be awarded by the Court; and (iii) pay future costs incurred in the administration and distribution of the Settlement payments, including the payment of taxes on any interest earned. (MVC Settlement ¶¶ 20-21; MVI Settlements ¶¶ 21-22.)

B. The NTC USA Settlement.

In exchange for dismissal with prejudice and a release of all claims asserted in the Complaint, as noted above, NTC USA has agreed to pay \$7,000,000 in cash. The payment is required to be paid into escrow within ten (10) business days from the date the motion for preliminary approval is filed. (NTC USA Settlement ¶16). NTC USA agrees to provide Plaintiffs'

co-lead counsel with a list of class members with whom it has settled and a list of class members with whom it has not settled, and the total amount of purchases made by each class member. Both lists are subject to audit (NTC USA Settlement ¶ 16.)

The NTC USA class consists of:

All individuals and entities who, at any time during the period from April 1, 1999 and continuing through June 30, 2002 (the "Class Period"), purchased DRAM in the United States directly from the defendants, their parents, subsidiaries, or affiliates. Excluded from the Class are defendants and their parents, subsidiaries, affiliates, all governmental entities, and alleged co-conspirators.

(NTC USA Settlement ¶ 1.) Upon the Settlement becoming final, plaintiffs and Class members will relinquish any claims they have against NTC USA based, in whole or in part, on matters alleged or that might have been alleged in this litigation. (NTC USA Settlement ¶¶13-15.) The release, however, excludes claims for product liability or breach of contract, indirect purchaser claims, or claims based on purchases of DRAM outside the United States. (NTC USA Settlement ¶15.) The Settlement becomes final upon: (i) the Court's approval of the Settlement pursuant to Rule 23(e) and the entry of a final judgment of dismissal with prejudice as to NTC USA; and (ii) the expiration of the time for appeal or, if an appeal is taken, the affirmance of the judgment with no further possibility of appeal. (NTC USA Settlement ¶11.)

The Settlement also requires NTC USA to assist Plaintiffs in the prosecution of this case against the remaining defendants by producing documents and making its employees available for depositions and trial, including supplying witnesses necessary to testify as to the authenticity and admissibility of documents. (NTC USA Settlement ¶23.)

Finally, the Settlement also authorizes the use of a maximum of \$400,000 of the Settlement Fund for notice and administrative costs (NTC USA Settlement ¶19(a)).

Subject to the approval and direction of the Court, the Settlement payment, plus accrued interest thereon, will be used to: (i) make a distribution to Class members in accordance with a proposed plan of allocation to be approved by the Court at final approval based on the dollar value of each Class members' DRAM purchases proportionate to the total claims filed; (ii) pay Class Counsel's attorneys' fees, costs, and expenses as may be awarded by the Court; and (iii) pay future

costs incurred in the administration and distribution of the Settlement payments, including the payment of taxes on any interest earned. (NTC USA Settlement ¶¶ 21-22.)

IV. THE SETTLEMENTS SHOULD BE PRELIMINARILY APPROVED

The approval of class action settlements required by Federal Rule of Civil Procedure 23(e) is a two-step process. Preliminary approval requires only that the terms of the proposed settlement fall within the “range of possible approval.” *Armstrong*, 616 F. 2d at 314. It amounts to a determination that the terms of the proposed settlement warrant consideration by members of the class and a full examination at a final approval hearing. *Manual for Complex Litigation* (4th ed.) § 13.14. After notice to the class, preliminary approval is followed by a review of the fairness of the settlement at final approval, and, if appropriate, a finding that it is “fair, reasonable and adequate.” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1988). Because it is provisional, courts grant preliminary approval where the proposed settlement lacks “obvious deficiencies” raising doubts about the fairness of the settlement. *See e.g., In re Vitamins Antitrust Litig.*, 2001 WL 856292, at *4 (D.D.C. July 25, 2001) (quoting *Manual for Complex Litigation* (Third) §30.41).

It is well-recognized that “[v]oluntary out of court settlement of disputes is ‘highly favored in the law and approval of class action settlements will be generally left to the sound discretion of the trial judge.’” *Wellman v. Dickinson*, 497 F.Supp. 824, 830 (S.D.N.Y. 1980) (citation omitted).

It hardly seems necessary to point out that there is an overriding public interest in settling and quieting litigation. This is particularly true in class action suits which are now an ever increasing burden to so many federal courts and which frequently present serious problems of management and expense.

Van Bronkhorst v. Safeco Corp., 529 F.2d 943, 950 (9th Cir. 1976); *see also Churchill Village, L.L.C. v. General Elec.*, 361 F.3d 566, 576 (9th Cir. 2004).

The Settlements before the Court amply meet the requirements for preliminary approval. First, the consideration for each Settlement is substantial.

The Settlements with the two Mosel companies provide for a total cash payment of \$15,000,000. The substantial settlement payment by the Mosel companies, viewed both in absolute and relative terms, clearly meet the requirements for preliminary approval. The payments represent

1 10.64% of the class-period DRAM sales to customers with which Mosel has not separately settled,
2 a settlement percentage in excess of that paid by Infineon.

3 The settlement with NTC USA provides for a cash payment of \$7,000,000. This substantial
4 settlement payment by NTC USA also clearly meets the requirements for preliminary approval.
5 The payment represents 5.26% of its' class period DRAM sales to customers with which NTC
6 USA has not separately settled. The settlement with Nanya is lower then the settlements with other
7 defendants for various reasons, among them the fact that NTC USA's parent Nanya Technology
8 Corporation, was dismissed from this action by the Court on February 26, 2007 and the fact that
9 any judgment obtained against NTC USA after trial might have been uncollectible.

10 Each settlement compares favorably to settlements finally approved in other price-fixing
11 cases. *See, e.g., In re Plastic Tableware Antitrust Litig.*, 1995 WL 723175, at *1 (E.D. Pa. October
12 25, 1995) (3.5% of sales); *In re Linerboard Antitrust Litigation*, 321 F.Supp. 2d 619, 627 (E. D. Pa.
13 2004) (1.62% of sales); *In re Shopping Carts Antitrust Litig.*, 1983 WL 1950, at *9 (S.D.N.Y. Nov.
14 18, 1983) (3% of sales); *Fisher Bros. v. Phelps Dodge Industries, Inc.*, 604 F.Supp. 446, 451 (E.D.
15 Pa. 1985) (3% of sales); *Fisher Bros. v. Mueller Brass Co.*, 630 F.Supp. 493, 499 (E.D. Pa. 1985)
16 (recoveries equal to .1%, .2%, 2%, .3%, .65%, .88%, and 2.4% of defendants' total sales).

17 In *In re Rubber Chemicals Antitrust Litigation*, 232 F.R.D. 346 (N.D. Cal. 2005), a
18 horizontal price fixing case in which some of the defendants had entered guilty pleas in related
19 criminal proceedings, Judge Jenkins, in the course of granting final approval, recently
20 characterized a settlement payment of 4% of a defendant's sales as "an excellent recovery."

21 In addition to these payments, the Settlements provide that the non-settling defendants
22 remain jointly and severally liable for damages caused by the alleged conspiracy, including those
23 from sales by the Settling Defendants. The Settlements, therefore, while providing a significant and
24 certain recovery for class plaintiffs, do not reduce the total amount of damages recoverable in the
25 case. *See In re Corrugated Container Antitrust Litig.*, 1981 WL 2093, at *17 (S.D. Tex. June 4,
26 1981).

27 Finally, all Settlements require Settling Defendants to cooperate in plaintiffs' prosecution of
28

1 this case against the remaining defendants. This is a valuable benefit to class members because it
 2 will save time, reduce costs, and provide access to information and documents to which they might
 3 not otherwise have access. *See In re Mid-Atlantic Toyota Antitrust Litig.*, 564 F.Supp 1379, 1386
 4 (D. Md. 1983) (. . . the commitment [the] Distributor defendants have made to cooperate with
 5 plaintiffs will certainly benefit the classes, and is an appropriate factor for a court to consider in
 6 approving a settlement.”).

7 The Settlements were the product of intense and thorough arms-length negotiations by
 8 experienced and informed counsel. Each of the negotiations occurred over a span of months and
 9 involved telephonic and face-to-face meetings and finally mediations before Judge Daniel J.
 10 Weinstein, Ret. on March 3, 2007 for Mosel and March 14, 2007 for NTC USA. They were
 11 contested and conducted in the utmost good faith. Class counsel negotiated the Settlements based
 12 on their review and analysis of millions of pages of defendants’ documents, their own substantial
 13 investigations, and the analysis of expert consultants. (Saveri, Decl. ¶¶ 6-10.) Counsel’s judgment
 14 that the Settlements are fair and reasonable is entitled to great weight. *Officers for Justice v. Civil*
 15 *Service Com’n*, 688 F.2d 615, 625 (9th Cir. 1982); *Rutter & Wilbanks Corp. v. Shell Oil Co.*, 314
 16 F.3d 1180, 1188 (10th Cir. 2002); *Wilkerson v. Martin Marietta Corp.*, 171 F.R.D. 273, 288-89
 17 (D.Colo. 1997). Indeed, there is generally “an initial presumption of fairness when a proposed
 18 class settlement, which was negotiated at arms’ length by counsel for the class, is presented for
 19 court approval.” 4 *Newberg on Class Actions* at 11.41 (4th ed.).

20 In light of these risks, and \$15,000,000 and \$7,000,000 in cash payments guaranteed by the
 21 Settlements, it is plain that the Settlements are worthy of preliminary approval. They provide
 22 substantial and certain benefits to the Class members and they avoid – at least with regard to
 23 Settling Defendants – the risks, delay and expense of further litigation. And while plaintiffs
 24 believe their case is strong, Settling Defendants have not conceded liability and would vigorously
 25 defend themselves at trial.

26 **V. THE PROPOSED NOTICE TO CLASS MEMBERS IS ADEQUATE**

27 Class members are entitled to the “best notice practicable under the circumstances” of any

1 proposed settlement before it is finally approved by the Court. Federal Rule of Civil Procedure
 2 23(c)(2)(b). The notice must state in plain, easily understood language:

- 3 • the nature of the action,
- 4 • the definition of the class certified,
- 5 • the class claims, issues, or defenses,
- 6 • that a class member may enter an appearance through counsel if the member so desires.

7 Plaintiffs propose that notice be given by mail or email to each Class member who may, by
 8 reasonable efforts, be identified, as well as published in the national edition of the Wall Street
 9 Journal. Attached to the Saveri Declaration as Exhibit D is the long form of proposed notice to be
 10 given to each class member, and attached to the Saveri Declaration as Exhibit E is the proposed
 11 summary notice to be published in the Wall Street Journal. Both forms of notice are identical to the
 12 forms of notice submitted to the Court in connection with the latest settlements. A proposed time
 13 schedule for final approval will be submitted to the Court sufficiently in advance of the hearing for
 14 preliminary approval.

15 VI. CONCLUSION.

16 For the foregoing reasons, plaintiffs respectfully submit that the Court grant preliminary
 17 approval of the Settlements, and order that notice be given to the Class and a hearing on final
 18 approval be scheduled according to a schedule to be submitted to the Court.

19 Dated: April 27, 2007

Respectfully submitted,

20 /s/ Guido Saveri

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